

PHYSICAL DISABILITY SEPARATION

Captain Robert E. Webb, Jr.¹ and Major David C. White²

1. Overview.

A soldier may be separated from the United States Army for a physical or mental impairment, whether a disease or injury, if it renders the soldier physically unfit for duty. Fitness for duty is a function of the soldier's ability to perform the duties of his or her primary military occupation specialty (PMOS) or officer specialty (OS) at a minimum level of competence given the soldier's rank and current duty position.³ The Physical Evaluation Board (PEB) is the sole forum within the Army to determine a soldier's unfitness for duty as a result of a physical impairment. Failure on the part of a soldier to be worldwide deployable by reason of a physical disability does not by itself render a soldier unfit for duty. The factual determination as to whether a soldier is fit or unfit for duty exclusively focuses upon duty performance. A soldier carrying multiple diagnoses may nonetheless be found fit for duty if there has been no significant diminution in the soldier's duty performance. It is only when a physical disability has risen to the high level of interrupting the soldier's service career, or term of service, that a PEB will make a factual finding of unfitness. To illustrate how this is so strongly a performance based system, it is not unusual to come upon the paradox wherein two soldiers of equal rank with identical medical conditions of equivalent severity, have contradictory fitness findings. This is where one soldier is found fit for duty and the other is not. This apparent contradiction in outcome is explained by the fact that one soldier can still perform the duties of his/her PMOS, while the other cannot. Consider the example of two PFCs, one a 11B5P airborne infantryman and the other a 71L administrative specialist, both of whom are afflicted with constant, moderate knee pain. This medical condition will render an infantryman unfit for duty given the demanding physical requirements of the Airborne Infantry, whereas the administrative specialist with only light physical requirements can still perform clerical duties at a minimum level of competence or higher, and will, therefore, be found fit within the limits of his/her physical profile.

¹Judge Advocate, USA Physical Evaluation Board, Fort Sam Houston, TX.

²USAR, PEB Attorney, Walter Reed Army Medical Center.

³DEP'T OF ARMY, REG. 635-40, MEDICAL SERVICES: PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION, para. 4-19a(1) (1 Sept. 1990) [hereinafter AR 635-40].

The process for making a fit for duty determination begins with the medical evaluation board (MEBD).⁴ A soldier may be referred to an MEB from a MOS/Medical Retention Board (MMRB) or by a reviewing or treating physician.⁵ The results of the MEB are forwarded to the Physical Evaluation Board (PEB) for adjudication. After adjudication, the PEB results are forwarded to the Physical Disability Agency (PDA) for review and final approval.⁶ The PDA is a Department of the Army agency that has final approval authority for disability cases adjudicated by the PEB.

2. The Medical Evaluation Board (MEBD).

The treating physician, company/battery commander, or a convened Medical/MOS Retention Board (MMRB), each possess the authority to refer a soldier to a MEBD if separation for medical reasons is immediately foreseeable. The soldier's servicing medical treatment facility (MTF) convenes a MEBD to document the soldier's medical history, current physical status and recommended duty limitations. The soldier's command prepares a memorandum on the commander's position on the soldier's physical abilities to perform PMOS/OS duties in the currently assigned duty position. The MEBD's mission is to determine if the physically-impaired soldier meets retention standards in accordance with AR 40-501, Standards of Medical Fitness.⁷ The PEB, however, is the sole determiner of the soldier's physical fitness for duty, as measured by duty performance, in accordance to AR 635-40, Physical Evaluation for Retention, Retirement, or Separation.

The MEBD forwards the soldier's case to the PEB for review if the MEBD finds that the soldier does not meet retention standards, according to PMOS/OS and grade, as prescribed by chapter 3, AR 40-501.⁸ However, a soldier is not automatically unfit because of a failure to meet the retention standards. AR 635-40 precludes the doctors at the MEBD from making a factual determination as to the soldier's physical fitness for duty. This fact-finding authority is solely within the purview of the PEB.⁹ If the physician violates this prohibition and renders a fitness assessment, it will simply be ignored by the PEB.

The MEBD findings are recorded on DA Form 3947 (Medical Evaluation Board Proceedings). This form documents the physical

⁴DEP'T OF ARMY, REG. 40-501, MEDICAL SERVICES: STANDARDS OF MEDICAL FITNESS, (30 Aug. 1995) [hereinafter 635-40].

⁵AR 635-40, para. 2-8,2-9.

⁶*Id.* para. 2-4(e-f).

⁷AR 40-501 *supra* note 2, para. 2-2.

⁸*Id.* para. 3-1.

⁹AR 635-40, *supra*, note 1, para. 4-11f.

or mental conditions that preclude the soldier's retention. If the soldier does not agree with the findings, he may so indicate on DA Form 3947 and attach a written appeal that sets forth the reasons he or she disagrees. If the Medical Treatment Facility's (MTF) approving authority does not make a favorable change in the original MEBD based upon the soldier's appeal, a copy of the soldier's appeal will be sent to the PEB along with the results of the MEBD.

3. Physical Evaluation Board Liaison Officers (PEBLO).

An important actor and source of information for soldiers throughout the PEB process is the PEBLO. The PEBLO collects and prepares the soldier's medical packet for presentation to MEBD and PEB.¹⁰ A soldier's medical packet consists of medical records, medical narrative summary of present disabling conditions, commander's memorandum and physical profile, along with other related information.

Each MTF should have a designated PEBLO available to provide counseling for soldiers from the time they are identified as requiring a MEB through the time that they are separated. The PEBLO will work with the Soldier's Legal Counsel and PEB to obtain required documentation and other medical information and will also serve as the point of contact between physicians and board members. The PEBLO is usually located in the Patient Affairs Division.

4. The Physical Evaluation Board (PEB).

A. Informal Boards.

Each case forwarded by the MEBD is reviewed first by an informal PEB. An informal board consists of three voting members: a combat arms colonel/06 serving as the President of the Board; a personnel management officer (PMO), usually reserve combat arms Lieutenant Colonel, and; a physician, either a Medical Corps Officer or a Department of the Army civilian physician.¹¹ The three board members determine by majority vote based upon a preponderance of the evidence the physical fitness/unfitness of the soldier based on PMOS/OS specific performance standards. If the Board determines that the soldier is physically unfit for duty in his/her present grade, rank, PMOS/OS and current duty position by reason of a physical disability,¹² the PEB then recommends a disability rating percentage based upon the soldier's present degree of severity

¹⁰AR 40-501, *supra*, note 2, para. 4-20.

¹¹AR 635-40, *supra*, note 1, para. 4-17(b-d).

¹²*Id.*, para. 4-19d(1-3).

for each medical diagnosis found to be separately unfitting. The soldier processing for physical disability separation possesses no legal right to appear or otherwise participate in the informal board proceedings. The PEB records its informal factual findings and the recommended disability rating on DA Form 199 (Election to Formal Physical Evaluation Board Proceedings).¹³ Once the PEB has informally adjudicated a soldier's disability case, the soldier will consult with his or her PEBLO at the MTF for assistance in choosing an election option. The soldier is afforded the following election options: a) concur with the PEB's informal findings and recommendations; b) request a formal administrative hearing, either with or without personal appearance, which is a statutory right; or, c) non-concur and submit a written appeal in lieu of proceeding with a formal board.¹⁴ If electing to proceed with a formal hearing, soldiers have the option to request minority representation based on race or the female gender. The board typically grants the soldier's request if substitute officers are reasonably available.¹⁵

The membership of the formal board will generally be the same as those members who sat on the informal board. If the informal board members are not available, then a qualified substitute officer will sit on the formal board. All board members are required to familiarize themselves with the case prior to the actual hearing. Once the soldier demands a formal hearing, he or she is entitled to regularly appointed military counsel.¹⁶ The soldier appearing before a formal hearing may elect to be represented by a private civilian lawyer at no expense to the government.

B. The Formal Physical Evaluation Board.

The formal Physical Evaluation Board is an administrative, fact-finding de novo hearing. The hearing is non-adversarial in nature, that is to say it is a "friendly hearing." In this regard, there is no government representative to oppose or counter the soldier's position at hearing. Generally, the formal board is not bound by the military rules of evidence except insofar as the evidence adduced at hearing must be relevant and material to the soldier's case. Although termed a formal hearing, the actual proceedings are somewhat relaxed to provide the soldier a fair hearing within a friendly atmosphere. Soldiers usually request a formal hearing to argue for a higher disability rating, believing that the recommended disability made informally did not accurately reflect their current level of

¹³*Id.*, para. 4-20b.

¹⁴*Id.*, para. 4-20c(1)(a-d).

¹⁵*Id.*, para. 4-17g(1-2).

¹⁶*Id.*, para. 4-17h.

severity. Some soldiers, who were found unfit by the informal Board, request a formal hearing to argue that they are fit for duty based on uninterrupted and undiminished duty performance. This serves to underscore the fact that PEB proceedings, unlike those of the MEBD, are performance based. It should be noted that soldiers who are found fit for duty at an informal Board, have no legal right to request a formal hearing. The President of the Board, however, has the discretion to direct a formal hearing when one board member strongly feels that the soldier is unfit. A soldier may otherwise waive his/her right to a formal hearing should they concur in the finding and recommendation of the informal board.

The mission of the formal PEB is twofold: 1) to determine whether the soldier can reasonably perform the duties of his or her primary MOS/OS and grade; and if not, 2) to determine the present severity of the soldier's physical or mental disability and rate it accordingly. The three members of the Board--the President, the Personnel Management Officer (PMO) and the medical doctor--may be challenged for cause and replaced if the challenge is sustained.¹⁷ The medical member of the Board is a physician (military or civilian) who may be a general medical officer or a practitioner in any specialized field of medicine. It is administratively impractical to have a physician sitting on the board whose medical specialty pertains to the soldier's unfitting condition. The two other board members are active component, reserve component or a DA civilian employee who do not need to be from the same branch or career management field as the boarded soldier. The PMO, however, is usually a reserve AGR officer. This is to accommodate Reserve Component soldiers processing for physical disability separation who are entitled to have a Reserve Component Officer sitting on the Board.

As the formal hearing is de novo, the PEB is not bound to its previous findings and recommendations. All issues are decided anew which means that the soldier's disability rating could be raised, remain the same, or be lowered. The focus of the formal hearing is the medical evidence of record primarily contained in the narrative summary written by the MEDB along with any subsequent medical addenda.

Following the closed board deliberations, the soldier is recalled to the hearing room where he/she is immediately notified of the Board's decision and given up to ten calendar days to make an election to concur or non-concur with the formal decision. If the soldier disagrees with the formal board results, the soldier may submit a written rebuttal to the board's

¹⁷*Id.*, para. 4-21.

findings and recommendations.¹⁸ The Board will consider the written appeal and issue a written decision to the soldier either reaffirming or modifying its formal decision. If the board reaffirms or modifies their decision, AR 635-40 requires the board to forward the entire formal board record to the Physical Disability Agency (PDA)¹⁹ in Washington, D.C., for final approval. The formal board proceedings are tape-recorded for final review by the PDA.

5. The Physical Disability Agency (PDA).

The PDA reviews all cases prior to final disposition in which the soldier has non-concurred with the decision of the PEB. The PDA may modify the PEB's findings and recommendations if it concludes that PEB made an error. Departing from generally accepted medical principles to adjudicate a case would, for instance, constitute error on the part of the PEB. The PDA reviews, through its staff psychiatrist, all psychiatric cases. The PDA, moreover, conducts random disability case reviews based either on selected categories of medical impairments or reviewing every tenth case received for final disposition. The PDA conducts random reviews to assure uniformity of result from the three regional PEBs located at Walter Reed Army Medical Center, Fort Sam Houston and Fort Lewis. This means that the final result of a soldier's disability case should be the same irrespective of which regional PEB adjudicated the case. In reviewing disability cases, the PDA has full authority to accept or modify the findings and recommendations of a PEB. In modifying a soldier's case, the PDA may reverse the factual finding of unfitness for duty made by a PEB. Therefore the PDA could find a soldier fit for duty who had been previously found unfit by a PEB. With respect to the PEB's recommended disability rating, the PDA can raise, affirm or lower the disability rating to reflect accurately the soldier's present level of physical impairment caused by the unfitting condition.²⁰ When the PDA makes a modification after reviewing a particular case, it gives the affected soldier written notice of such, and provides a sufficient period of time to respond in writing prior to finalization of the case.

6. Rating Disabilities Found To Be Unfitting.

Only those service-connected physical impairments which render the soldier unfit are ratable under the U.S. Army Physical Disability System. As stated before, "unfitting" is interpreted to mean service or career interruption. For soldiers with

¹⁸*Id.*, para. 4-21t.

¹⁹*Id.*, para. 4-22.

²⁰*Id.*, para. 4-22e.

multiple diagnosed physical impairments, each is potentially ratable provided that the PEB finds each physical impairment to be separately unfitting. The Department of Veteran's Affairs (VA), on the other hand, will rate any and all service-connected conditions.²¹ Many people mistakenly believe that the Army follows the same rules as the VA. This is not the case. The Army rates an unfitting condition for present level of severity whereas the VA rates for future progression, that is the prognosis of the illness or injury, and for adverse impact on employability within the civilian job sector.

When a PEB determines that a soldier is unfit for continued military service by reason of a physical disability, the disabling condition is rated in accordance with the Veteran's Administration Schedule for Rating Disabilities (VASRD) as modified in AR 635-40, Appendix B, and DOD Directives 1332.38 and 1332.39. The mere fact that a soldier has an impairment that appears in the VASRD does not automatically result in entitlement to disability rating. As will be remembered, The PEB must first determine that the impairment renders the soldier unfit for duty. Contrariwise, when the VA rates a service-connected physical impairment or disease, there is no consideration of performance-based factors.

The VASRD specifies diagnostic codes for a wide spectrum of diseases and physical impairments covering all major body systems. By way of example, there are injuries/diseases of the cardiovascular, respiratory and musculoskeletal systems. Each specific diagnostic code specifies disability ratings percentages in increments of ten, beginning with 0% and continuing to 100%, if so indicated. The specific disability rating expressed as a percentage indicated the degree to which the rated condition has impaired the whole person. Again it must be remembered that the Army and VA rate for different purposes. A particular VASRD diagnostic code may have a rating ceiling of 30%. The Army cannot exceed the specified upper limit, but the VA can award a 100% disability rating for that condition if it were to find that the severity of this condition rises to the level of rendering the soldier incapable of being trained for any type of gainful civilian-sector employment. If an impairment is so mild that it fails to meet the minimum criteria listed for an assigned rating under the VASRD, AR 635-40 and DOD directives,²² the PEB may recommend a zero percent disability rating even if not indicated on the applicable diagnostic code. A zero percent rating is a minimum rating and, as such, is a compensable rating and carries the same Army benefits, to include severance pay, as a 10 or 20

²¹*Id.*, para. 4-19i.

²²DEP'T OF DEFENSE, DIR. 1332.18, SEPARATION OR RETIREMENT FOR PHYSICAL DISABILITY, (4 NOV. 1996).

percent rating. Zero percent ratings will not be awarded if a mandatory minimum rating is specified.²³ Convalescent ratings contained in the VASRD are for VA use only and do not apply to the Army.

7. Physical Evaluation Board Recommendations.

A. Existed Prior to Service (EPTS).

A soldier will not receive a rating for a disability that preexisted entry into military service if the PEB finds that the unfitting condition has not been permanently aggravated by military service.²⁴ This creates a very difficult standard of proof, especially for reserve component members who must establish a nexus between their unfitting condition and military service. Service aggravation has a narrow definition in AR 635-40, Chapter 5-2, that requires a permanent aggravation of the soldier's condition beyond what would have occurred as result of "natural progression." The PDA will conclude that a chronic illness existed prior to service (EPTS) if it manifests itself within a very short period of time, usually 90 days, after entry onto active duty. The Army uses accepted medical principles to determine the natural progression or onset of an impairment. For example, it is not unusual for a small number of soldiers to display bizarre behavior sometime during basic training, AIT or during the first few months of their first overseas assignment. Subsequently, these soldiers in question are often diagnosed as being schizophrenic. In such cases, the onset of the developmental or prodromal period is dated 90 days prior to the first display of bizarre symptoms. This typically makes this form of mental illness EPTS without permanent aggravation. Therefore, the PEB will find the soldier unfit and recommend separation without entitlement to disability benefits.

As in the above example, if the PEB considers a soldier's impairment EPTS without permanent service aggravation, the soldier will not receive a disability rating.²⁵ The PEB will recommend separation without disability benefits (i.e. without entitlement to lump sum severance pay) and the soldier is medically discharged. By way of further example, the condition of flat feet is a common EPTS condition which often becomes symptomatic for pain as a function of physical activity. The Army's physical training requirements of running, rucksack marches and other equally demanding physical activities, function to increase the intensity of pain for soldiers whose flat feet

²³DEP'T OF DEFENSE, DIR. 1332.39, APPLICATION OF THE VETERANS ADMINISTRATION SCHEDULE FOR RATING DISABILITIES, 14 Nov. 1996) [hereinafter DoD 1332.39].

²⁴AR 635-40, *supra* note 1, para. 4-19e.

²⁵*Id.*, appendix B-11.

has become symptomatic for pain. While these physical activities temporarily aggravate the pain experienced in flat feet, it cannot serve as the basis for "permanent service aggravation" of a congenital condition. The cited condition would be seen merely as natural progression of an EPTS condition. To succeed in gaining a disability rating for an unfitting case of flat feet, the soldier would need to show a specific trauma or surgical mishap that has permanently aggravated his/her flat feet. Permanent service aggravation equates to a level of severity caused by military service that is far above a level of severity that can be attributed to natural progression and for which there will be no significant improvement following cessation of physical activity known to aggravate temporarily the unfitting condition. An acceleration of natural progression attributed to military service would also constitute permanent service aggravation.

B. Fit by Presumption.

The presumption of fitness applies whenever a soldier's military service is terminated for reasons other than the soldier's diagnosed physical impairment. Examples include bars to reenlistment, voluntary or involuntary retirement, Qualitative Management Program (QMP), administrative separations under the provisions of AR 635-200, and the like. The presumption will apply whenever the approval date or imposition date of the cause of termination precedes the dictation date of the MEBD narrative summary. A ruling that the presumption of fitness applies does not necessarily mean that a soldier is fit for duty. It merely means that the soldier's impairment is not the cause for separation from the service.

A soldier can overcome the presumption if he or she shows, by objective medical evidence, that his/her military service was effectively interrupted by reason of a physical impairment.²⁶ Evidence of prior unfitness may be found in counseling statements for unsatisfactory performance caused by the soldier's physical impairment. Comments on OERs/NCOERs pertaining to the soldier's/officer's diminished duty performance by reason of a physical impairment are effective in rebutting the presumption of fitness.

The PEB presumes that soldiers who become retirement eligible or who are within one year of their retention control point (RCP) are fit for duty. If a soldier has been able to perform at a minimum level of competence the duties of his/her PMOS up to the point of becoming retirement eligible or reaching

²⁶DOD DIRECTIVE, 1332.39, *supra* note 21.

the retention control point, he/she cannot convincingly argue sudden unfitness for duty by reason of a physical disability.

If there were either an abrupt onset of a disease process or if there were a sudden acute change in a long-standing diagnosed condition (with either event resulting in diminished duty performance falling below a minimum level of competence), the affected soldier might well succeed in rebutting the presumption of fitness and thereby gain a disability rating.

C. Separation with Severance Pay.

A soldier separated from the service with less than a 30% disability rating will receive severance pay²⁷ as financial compensation from the Army. Severance pay is calculated by doubling the soldier's monthly base pay multiplied by the number of active federal service years, not to exceed 12 years. This is an one-time lump sum payment, and may effect any monetary VA benefits for which the soldier may qualify. Unlike, the VA monthly stipend, severance pay from the Army may be taxable income for the soldier. Severance pay is not taxable for those soldiers who were in the Armed Forces on 24 September 1975 or if the disability is due to a combat-related injury or from an instrumentality of war (such as a parachute related injury). If the VA rates the soldier for the same condition which the PEB found unfitting and awarded a disability rating, the severance will then become nontaxable income to the separated soldier. If the calendar year during which the soldier was separated has not passed, the soldier can write to the Army Finance Center in Indianapolis requesting that the withheld taxes be rebated. Once the calendar year has passed, the Army has already transferred the severance pay tax withholdings to the Internal Revenue Service. A soldier must then request a refund with the IRS by filing a 1040X form along with his/her tax return. The soldier must also attach a copy of her DD 214, DA Form 199, and a letter from the VA documenting the soldier's disability percentage. The IRS will review and consider the soldier's filed tax return on a case by case basis.

D. Permanent Disability Retirement.

A soldier with less than 20 years of active federal service qualifies for disability/medical retirement if his/her disability rating is 30 percent or higher. Disabled soldiers with a medical retirement rated at 30% will draw for a lifetime

²⁷AR 635-40, *supra* note 1, appendix b-15.

30% of their base pay calculated at their retirement date. Active component soldiers with vested retirement based on 20 or more years of active federal service, who are found unfit and awarded a disability rating of 30% or higher, being eligible for both a longevity and medical retirement, will always draw a retirement based on the higher amount. If, for instance, a soldier's disability rating percentage exceeds that percentage of retired pay based on years of service, he/she will receive as retired pay the higher amount based on the disability rating percentage. Contrariwise, if the percentage of retired pay based on years of service is higher than the disability rating percentage, the retired pay based on years of service will take precedence over the disability rating percentage. By way of a specific example, an unfit soldier with 22 years of service is entitled to receive 55% of his/her base pay as regular retirement pay. But if the PEB were to rate the unfitting condition at a 60% disability, that soldier would receive a monthly pension equal to 60% of his/her base pay. Additionally, the soldier's retired pay will be classified as disability retired pay. There is, however, no "double dipping"; the 60% disability amount will not be added to the soldier's 55% retirement amount. If that same soldier received a disability rating of 40%, and qualified for 55% of his/her current base pay; the soldier will receive 40% of base pay for disability retirement, and 15% of base pay for standard longevity retirement. This distinction is significant for two reasons: (1) it can figure in reducing tax liability, and (2) disability retirement pay is not subject to division under the Former Spouses' Protection Act.

Note that by law a retired soldier is prohibited to receive more than 75% of his/her military base pay, whether retired medically or retired for years of service. A disability rating less than 75% will result in pensions equal to that amount of base pay (e.g., a soldier with 24 years service who is rated at a 40% disability rating, disability retired pay will be 40% of base pay with an additional 20% in ordinary retired pay). Permanent disability ratings in excess of 75% will result in compensation limited to 75% of the soldier's base pay. Soldiers placed on the Temporary Disability Retirement List by regulation will receive no less than 50% of their current base pay, even if their disability rating is 30%.

Reserve component members found unfit at a disability rating of less than 30%, but who have a vested reserve retirement as evidenced by a twenty year retirement letter, have the election of choosing between immediate receipt of disability severance pay or delayed receipt of the vested reserve retirement at age 60. The reserve component member will not be able to receive both benefits and should base an election upon factors such as age, immediate financial needs, life expectancy,

and other relevant factors. It is usually to the financial benefit of the Reservist to retain the retirement based on years of service.

E. Temporary Disability Retirement List (TDRL).

Soldiers rated at 30% or more and whose impairments are considered to be unstable for rating purposes are placed on the TDRL²⁸ and required to be re-examined in 12 or 18 months. This is a "wait and see" approach for medical conditions that are likely to either improve or deteriorate within the next 18 months. Such conditions are not considered stable for rating purposes inasmuch as the PEB rates solely for present severity and not for future progression. The soldier can be retained on the TDRL for a maximum of five years if the soldier's condition remains unstable and continues to meet the minimum criteria for a rating of 30% or more. If a soldier's impairment stabilizes within the five year period, the PEB will recommend a permanent disability rating and remove the soldier from the TDRL. All of the initial options (fit for duty, separation with severance pay, separation without benefits, and permanent disability retirement) are available to the PEB when making a final adjudication of the case. Should the soldier disagree with PEB's final findings and recommendations, he/she has a right to demand a formal hearing. If a soldier's unfitting condition has not stabilized within the five year period, the PEB will proceed to rate the soldier for the level of severity attained at the end of the five year period.

8. Line of Duty Determinations (LOD).

Injuries or diseases contracted in the line of duty entitle the unfit soldier to disability compensation in the form of severance pay or a medical retirement. An unfavorable LOD determination disqualifies a soldier from receiving disability compensation. If, for example, the PEB receives a negative line of duty determination after it has adjudicated a disability case, it will revise its findings and recommendations, reversing any award of benefits. Usually, if an active duty soldier is pending an LOD, the PEB will conditionally adjudicate (noted on DA Form 199 as such) the case pending final outcome of the LOD. In the case of Reservists, the PEB will not recommend a disability rating without first having received a LOD determination for the unfitting disability.

Although the PEB cannot modify the LOD determination, it can return the case to the casualty branch. The casualty branch determines if there are LOD issues which require further examination.

²⁸Id. para. 7-2.

9. Eligibility for Processing.

Soldiers who are under investigation or pending charges which could result in dismissal, punitive discharge, or an administrative separation under other than honorable (OTH) conditions, are not eligible for processing for physical disability separation.²⁹ The PEB will return the soldier's case file to the MTF awaiting resolution of the charges before the PEB will take additional action. If the action is favorably resolved for the soldier and the possibility of an adverse discharge or separation no longer exists, processing will then continue. Additionally, cadets, AWOL soldiers, and soldiers confined for civil offenses are not eligible for processing through the physical disability system.

10. CONCLUSION.

The U.S. Army Physical Disability System is a complex and esoteric system for medically separating or retiring soldiers found to be unfit for duty. The system strives to balance the best interests of soldiers afflicted with physical impairments with the Army's paramount mission to maintain a fit fighting force. The Army policy of rating unfitting physical impairments or diseases is predicated on following established medical principles to rate physical disabilities on the basis of impaired function of the whole person. This approach measures the severity of a rated disability relative to all possible injuries and disease processes that degrade human bodily function. The consequence is that the Army disability ratings, based on increments of ten, actually yields higher disability ratings than comparable civilian disability systems such as state workers' compensation systems. Nonetheless, some soldiers being processed for physical disability separation express dissatisfaction with the Physical Disability System, especially with respect to the way disabilities are rated and how financial compensation is awarded. On the matter of compensation, disabled veterans must be reminded that when Congress enacted Public Law creating the Physical Disability System for the US Military establishment, it was envisioned that disabled service members, though assisted financially by their branch of service and the VA, would still be expected to contribute to their own support by working to the extent permitted by their physical impairment. This partnership arrangement between the government and the disabled veteran is virtually unrivaled by any other country in the world. A comparative study reveals that most countries have no comparable system for compensating disabled soldiers. A case in

²⁹AR 635-40, *supra*. note 1, paras. 4-1,4-2.

point is the paraplegic Russian Army veteran from the war in Afghanistan who can routinely be seen begging for money in the Moscow subway.